CONSTRUCTIVE TRUSTS BASED ON PROMISES MADE TO SECURE BEQUESTS, DEVISES, OR INTESTATE SUCCESSION

EQUITY has long exercised jurisdiction to enforce a constructive trust (1) against a legatee who secured, or prevented the revocation of, his bequest, (2) against a devisee who obtained, or prevented the revocation of, his devise, and (3) against an heir, who persuaded an ancestor to refrain from making a will or to revoke a will already made and refrain from making a new one, by the giving of an oral promise to apply for others in ways promised some or all of the property thus obtained, and who, in violation of his promise, claims the property for himself. In *Chamberlaine* v. *Chamberlaine*,[1] decided in 1678, in making a devisee pay certain sums, which he had agreed to pay in consideration of the testator's forbearing to alter his will so as to give the sums as legacies, Lord Chancellor Finch, afterwards Lord Nottingham, said it was "the constant course of this court to make such decrees upon promises made that the testator would not alter his will." If the judge who introduced the bill for the Statute of Frauds in the House of Lords, a statute which was a wills statute as well as one calling for written evidence of various contracts, could treat this jurisdiction of chancery as a matter of course, as he did treat it, only a few months after the passage of the Statute of Frauds, it would seem as if we ought not to have any difficulty with it. Unfortunately, however, American courts fail to agree in their answers to the fundamental question whether the promisor who is sought to be charged as trustee must have had at the time he made his promise an intent not to keep it, and this failure to agree on that essential matter makes it important to examine the cases critically. It will be well to set out the general principles first and then to collate the authorities.

A. General Principles

It is, of course, true that the statutes relating to wills, to descent, and to distribution are to be observed by the courts. Moreover,

[1] 2 Freem. Ch. 34 (1678).

whether or not chancery judges are strictly bound by those provisions of the Statute of Frauds which do not expressly, as the trust provisions do, apply to things equitable, they have always accepted the statute, except so far as the part-performance-specific-performance doctrine, or some phases of the doctrine of the reformation of written instruments or of the doctrine of estoppel may be deemed a partial rejection, and except so far as such judges may have been too liberal in finding constructive or resulting trusts. Hence any discussion of the doctrine of chancery as to constructive trusts enforced for breach of oral agreements as to the disposition of property which was bequeathed or devised to, or inherited by, the promisors, solely because of their promises, may well begin with the consideration of what is essential to the observance of the statutes as to wills, and be followed by a similar discussion as to the Statute of Frauds.

Incorporation into a will by reference and non-testamentary subsequent definition of legacies and devises. — By the statutes as to wills a method of executing wills and testaments is provided, and no instrument can properly be given effect as a will which does not meet those requirements. In most jurisdictions the document executed as a will may by appropriate reference incorporate into itself, and so make part of itself as a will, a writing existing at the time the will is executed; [2] but in a few jurisdictions incorporation by reference of papers, not executed in the way wills or codicils are required to be, is allowed only for the purpose "of identifying the object or subject of a bequest [or devise] actually made and denoted in a will." [3] In no jurisdiction may a testator in an executed will reserve to himself the right to supply names or amounts of gifts, or otherwise determine testamentary dispositions, by a subsequent writing not executed with the formalities required in the case of a will or codicil. The reason is that such names or such amounts of gifts cannot be supplied in such a way without the act of supplying them being essentially testamentary. In writing the names and amounts the writer is making no immediate dis-

[2] 1 Jarman on Wills, 6 Eng. ed., pp. 135–138; Gardner on Wills, pp. 44–51; Page on Wills, pp. 183–190.

[3] Hatheway *v.* Smith, 79 Conn. 506, 521, 65 Atl. 1058, 1063 (1907); Booth *v.* Baptist Church, 126 N. Y. 215, 28 N. E. 238 (1891); *In re* Emmons' Will, 110 N. Y. App. Div. 701, 96 N. Y. Supp. 506 (1906).

position of the property, but is deliberately supplying information of his intentions as to the disposition to be made of his property at his death, and his writing, which in no respect differs from an attempted will or codicil, must necessarily be ineffective unless executed in the manner required in the case of wills and codicils. The subsequent memorandum is in all essentials an attempted codicil and must be executed in the way in which in the given jurisdictions codicils are required to be executed, or else it must fail to have any effect.[4]

But when the foregoing is said, not all is said that needs to be. A testator may put in his duly executed will provisions which may be given a different application, and therefore be made to constitute in a sense a different property disposition, by events which happen after the execution of the will. For instance, a trust to dispose of property and divide the proceeds among those who should be the testatrix's partners at the time of her death, or to whom she might have disposed of her business, was held to be good in favor of those to whom the testatrix did dispose of her business.[5] So it has been held that a gift in a will of all one's property to the person who shall furnish the maker of the will at the maker's request with support may be claimed by one who meets the conditions after the execution of the will.[6] In each case the subsequent act of volition of the testator, which results in the designation of the person to take under the will, is performed for other than testamentary reasons, and hence the designation is not fairly to be called testamentary. As was said by Lord Chancellor Cottenham in the case of the trust for those to whom the testatrix should dispose of her business:

"In the present case the disposition is complete. The devisee, indeed, is to be ascertained by a description contained in the will; but

[4] "Cases in which there is reference to an existing paper, it is obvious, stand upon quite a different footing from those in which a testator (as often occurred under the old law) attempts to create, by a will duly attested, a power to dispose by a future unattested codicil. To allow such a codicil to become supplementary to the contents of the will itself would, it is obvious, tend to introduce all the evils against which the Statute of Frauds [as a wills statute] was directed, and indeed give to the will an operation, in the testator's lifetime, contrary to the fundamental law of the instrument." 1 Jarman on Wills, 6 Eng. ed., p. 133.

[5] Stubbs *v.* Sargon, 3 Myl. & C. 507 (1838).

[6] Dennis *v.* Holsapple, 148 Ind. 297, 47 N. E. 631 (1897).

such is the case with many unquestionable devises. A devise to a second or third son, perhaps unborn at the time — many contingent devises — all shifting clauses — are instances of devises to devisees who are to be ascertained by future events and contingencies; but such persons may be ascertained, not only by future natural events and contingencies, but by acts of third persons. Suppose a father, having two sons, and having a relation who has a power of appointing an estate to some one of them, makes his will and gives his own estate to such one of his sons as shall not be the appointee of the other estate — or with a shifting clause. Here the act of the donee of the power is to decide who shall take the father's estate; but there is nothing in the Statute of Frauds to prevent this, because the devise by the will is complete, that is, the disposition is complete — the intention is fully declared, though the object to take remains uncertain. If the subsequent act removing that uncertainty, and fixing the identity of the devisee, were to be considered as testamentary, in the case above supposed, the donee of the power would be making or completing the will of the father, that is, one man would be making another man's will. The act, therefore, is not testamentary; and, if not, then why should not the act be the act of the testator himself? It is objected to upon the ground of its being testamentary; but if it be not testamentary when done by a stranger, it cannot be so when done by the testator. If it were otherwise, a testator could not devise lands, or give legacies charged upon land, to such person as might be his wife at his death —to such children as he might have — or to such servant as he might have in his service at his death." [7]

Gifts causa mortis. — Not only may some unattested volitional acts of the testator subsequent to the will be allowed to determine the identity of persons to take under a will or the amounts they may take, but some *quasi*-testamentary acts, — such as gifts *causa mortis*, where delivery takes the place of the execution of a will, — may even enable essentially testamentary dispositions to be effected without compliance with the statutes governing wills. To be sure the delivery, actual or symbolic as the case may be, marks a gift

[7] Stubbs *v.* Sargon, *supra*, 511–512. With reference to a direction in the will that advancements subsequently made and charged in testator's books or papers be deducted from legacies, see *In re* Moore, 61 N. J. Eq. 616, 47 Atl. 731 (1900); Langdon *v.* Astor's Heirs, 16 N. Y. 1 (1857); Robert *v.* Corning, 89 N. Y. 225 (1882); Harris *v.* Harris's Estate, 82 Vt. 199, 72 Atl. 912 (1909). For such a direction to be effective, advancements must in fact have been made. Langdon *v.* Astor's Heirs, *supra* (*semble*); Hoak *v.* Hoak, 5 Watts (Pa.) 80 (1836). To the extent that they have not been made, the subsequent writing is necessarily testamentary in intent and nature.

causa mortis off from a strict testamentary disposition,[8] but the revocable nature of the gift makes that distinction very slight, and in those jurisdictions where the title to the thing delivered as a gift *causa mortis* does not pass until the donor dies,[9] the distinction becomes microscopic. Nevertheless the distinction is well established.

Contracts to bequeath or to devise or to die intestate. — Another *inter vivos* transaction which closely resembles a testamentary disposition is a binding contract to bequeath or to devise property other than that furnished, or to be furnished, as a consideration to the promisor. Such a contract is either unilateral (the act or property being actually given for the prospective testator's promise) or is bilateral (mutual promises); but whether it is unilateral or bilateral, the contract resembles a gift *causa mortis* in that a prejudicial step, — the making of the contract, — is taken at once. It is, however, really much less testamentary in semblance than is a gift *causa mortis* because a contract is not revocable by the act of one party alone, whereas a gift *causa mortis* is revocable by the donor. If the contract is to devise land and the Statute of Frauds has been complied with,[10] or if part performance

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[8] "A gift *causa mortis* resembles a testamentary disposition of property in this: that it is made in contemplation of death, and is revocable during the life of the donor. It is not, however, a testament, but in its essential characteristics is what its name indicates — a gift. Actual delivery by the donor in his lifetime is necessary to its validity, or if the nature of the property is such that it is not susceptible of corporeal delivery, the means of possession of it must be delivered." Smith, J., in Emery *v.* Clough, 63 N. H. 552, 554, 4 Atl. 796, 798 (1885).

[9] Hatcher *v.* Buford, 60 Ark. 169, 29 S. W. 641 (1895).

[10] It is generally held that an oral contract to devise land is within § 4 of the Statute of Frauds. See cases collected in 5 Am. & Eng. Ann. Cas. 495, n.

Whether an oral contract to bequeath personal property is within § 17 is not so clear. In Wellington *v.* Apthorp, 145 Mass. 69, 73, 13 N. E. 10, 12 (1887), C. Allen, J., for the court, said of a contract to bequeath money:

"Nor is it contended that a contract to leave a certain amount of money by will to a particular person, though oral, is open to objection under the Statute of Frauds. It is not a contract for the sale of lands or of goods; and it may be performed within a year. . . . Such a contract differs essentially from a contract to devise all one's property, real and personal, which comes within the Statute of Frauds. Gould *v.* Mansfield, 103 Mass. 408."

The Massachusetts statute mentioned in note 16, *post*, was passed after Wellington *v.* Apthorp was decided.

But while a contract to bequeath money is not within § 17 of the Statute of Frauds, it has been intimated that a contract to bequeath specific personal property is within

by the prospective devisee has taken place, chancery will give appropriate relief to the promisee of the contract to bequeath or to devise or to the beneficiary of that contract.

Chancery will not, of course, supply a will where one was not executed, nor supply a bequest or devise contracted for but not inserted in the will actually executed; but in the case of a contract to devise, if the provisions of the Statute of Frauds other than those relating to wills furnish no obstacle, it will make the person who succeeds to the property hold for, and convey to, the promisee or the beneficiary of the promise. There was less reason for equity to interfere to declare and enforce an equity where the contract was for a bequest as distinguished from a devise, as ordinarily a money judgment against the executor or administrator for breach of contract would be adequate relief; but as chancery early took jurisdiction of the administration of estates,[11] and as an incident to that jurisdiction entered decrees for money payment on claims against estates, chancery quite naturally came to speak of an equity where the contract called for a bequest of specific chattels and, even where the contract was for a pecuniary legacy, gave appropriate relief on the theory of an equity in the promisee.[12]

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that section. See Turnipseed *v.* Sirrine, 57 S. C. 559, 35 S. E. 757 (1899). In that case there was a mutual will contract between an aunt and a niece followed by the execution of the mutual wills and the age of the aunt was such, the legacy was so large, and the wills remained executed so long before the niece revoked hers that in the view of the court the niece had received frec what amounted to a considerable insurance on the aunt's life. The court therefore held that it would be fraudulent for the niece's executor to plead the statute, and that therefore the oral contract for the making of mutual wills was taken out of § 17 of the Statute of Frauds. See also Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666 (1885).

[11] "Already in Elizabeth's day a legatee, instead of going to the ecclesiastical court, will sometimes file a bill in chancery; by this time the ecclesiastical courts have grown too feeble to protect themselves. It may be that the cases in which the Chancery first interfered were cases in which the legatee was not a mere legatee, but was also a *cestui que trust.* But at any rate the Court of Chancery soon became the regular court for actions by legatees. Then again the creditor had often an occasion to go thither. He had no specialty, or no specialty that bound the testator's heir, and the testator's personal estate was inadequate for the payment of his debts; on the other hand the testator, being an honest man, had devised his real estate to X. and Y. upon trust to pay his debts. Here the creditor wanted the aid of a court of equity because he wanted to enforce a trust. Thus in one way and another the court obtained a footing in the field and gradually it subdued the whole province of administration." Maitland's Equity and the Forms of Action, 193.

[12] See Ridley *v.* Ridley, 34 Beav. 478 (1865).

In the United States, where we do not have the old general administration bill,

It is difficult to name and classify the relationship recognized and enforced in these contract-to-will and contract-to-die-intestate cases, where equity takes jurisdiction, for the courts often use specific-performance-of-contract language and often use trust language. Take, for instance, a case where, because of the Statute of Wills and of section four of the Statute of Frauds, the express contract cannot be recovered upon at law.[13] The complainant having complied with equity's requirement of part performance, what is the nature of his recovery in chancery? The situation is different from the ordinary specific-performance situation, for in that ordinary situation chancery originally compelled the execution and delivery of the particular conveyance contracted for, as, indeed, it will so compel to-day in the case of a contract for real estate in a

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or equivalent chancery jurisdiction, it is probably true everywhere that equity will not give a remedy on these contracts unless the legal remedy is inadequate.

In Day *v.* Washburn, 76 N. H. 203, 81 Atl. 474 (1911), where, in violation of testatrix's promise to bequeath all her property to plaintiff, she left certain items of personal property of considerable value to two of the defendants, equity jurisdiction was rested on the ground that while "a decree for specific performance would have precisely the same effect as a judgment for damages in a suit at law," yet, as the administrator with the will annexed had been made a party defendant, the bill would be treated as if he had brought a bill to compel the other parties to interplead.

In Kundinger *v.* Kundinger, 150 Mich. 630, 114 N. W. 408 (1908), a complainant who had secured a divorce from the testator for his adultery and had refrained from bringing legal proceedings to procure alimony, on the testator's promise that if she would so refrain he would take care of her and provide by will for her support, was allowed what the court called "specific performance" against the trustee to whom testator had left his property in trust for others. That was on the ground that while complainant might have filed a claim in the Probate Court and recovered damages for breach of contract, — citing *In re* McNamara's Estate, 148 Mich. 346, 11 N. W. 1066 (1907), — that was not an adequate remedy, as she was entitled to have the support come to her as needed and "no provision in dollars and cents could quite as efficiently meet this requirement" as could the proper equity decree. *Cf.* Riley *v.* Allen, 54 N. J. Eq. 495, 35 Atl. 654 (1896).

[13] Most of the specific-performance-of-contract-to-bequeath-or-devise cases that get into the reports are part-performance-of-oral-contract cases, and quite frequently they are cases involving the troublesome question of whether the rendition of personal services not capable of reasonably definite and satisfactory pecuniary valuation will suffice as part performance. For late cases of that kind see Brasch *v.* Reeves, 124 Minn. 114, 144 N. W. 744 (1913) and Smith *v.* Cameron (Kan.) 141 Pac. 596 (1914). See a note on such cases in 44 L. R. A. N. S. 733. Compare the Statute-of-Frauds cases cited in the notes in 15 L. R. A. N. S. 466 and 38 L. R. A. N. S. 752. On the right to specific performance or injunction during the lifetime of the one who has conveyed or is about to convey property in violation of his agreement to leave the same at his death to complainant, see Newman *v.* French, 138 Ia. 482, 116 N. W. 468 (1908) and note in 18 L. R. A. N. S. 218.

sister state or a strictly foreign jurisdiction, while no court will compel the execution and probate of an instrument to serve as the will of the deceased. The situation is also different from that of the customary constructive trust, for the recovery is not measured by the enrichment which the deceased, and through him his heirs, next of kin, devisees, or legatees, have derived from the promisee, but instead is measured by what was promised in exchange for that enrichment. It would seem as if the situation is essentially one of specific performance,[14] but as if, as an aid to clear thinking, it is worth while to discriminate the juridical act in such a case from ordinary specific performance by adopting for it the phrase "*quasi*-specific performance." [15] On this *quasi*-specific-performance theory, then, relief in equity will be given in the contract-to-devise cases where the contract is in writing, or, if it is oral, comes within the part-performance doctrine,[16] provided that to give such *quasi*-

[14] In Bolman *v.* Overall, 80 Ala. 451, 455, 2 So. 624, 626 (1886), Somerville, J., said of a contract to leave property by will:

"The principle upon which courts of equity undertake to enforce the execution of such agreements is referable to its jurisdiction over the subject of specific performance." While the court did also use language denoting the trust theory, many courts consider specifically performable contracts only a separately named species of trusts.

And in Burdine *v.* Burdine's Executor, 98 Va. 515, 519, 36 S. E. 992, 993 (1900), Buchanan, J., said:

"Strictly speaking, an agreement to dispose of property by will cannot be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; not after his death, because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to a specific performance of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser with notice of the agreement, as the case may be."

See a note on "Specific Performance of Contract to Make Will" in 31 Ann. Cas. (1914 A), 399.

[15] That new name should also be applied to the enforcement of a contract in equity against the vendor's grantee with notice or without value (see Snell *v.* Hill, 263 Ill. 211, 105 N. E. 16 (1914)), and indeed to its enforcement against anybody but a party to the contract.

[16] Whether the Massachusetts statute which provides that "No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding unless such agreement is in writing signed by the person whose executor or administrator is sought to be charged, or by some person by him duly authorized" (1 Rev. Laws, Mass., 1901, ch. 74, § 6, p. 655) is subject to the part-performance doctrine is not clear from its language, but probably it is not subject to it. See Emery *v.* Burbank, 163 Mass. 326, 39 N. E. 1026 (1895). Neither is it clear whether the statute applies except where legal or equitable relief is sought against the executor or administrator.

specific performance would not work unjustifiable hardship and oppression.[17]

But if, on the other hand, the case is not in fact one for *quasi*-specific performance, but instead is one for the application of trust principles, the trust, being enforced against some one other than the promisor, must be some species of constructive trust. If constructive-trust principles are to be applied, equity should say to the defendant: "You must either reimburse the complainant to the extent that his services, or the other consideration furnished, enriched the deceased, and through him enriched you, or else you must hand over the property promised complainant by the deceased. You must elect which you will do."

The reason for such an election is that a constructive trust is enforced merely because the express promise is not to be performed and because, on that account only, unjust enrichment would take place if a trust were not enforced. If the defendant is willing to perform, even though his performance is tardy, he should be permitted to do so and no constructive trust be enforced. But often in the contract to will cases equity will not want to give the defendant any election because it will not be just to give him one, — in most cases he ought to be made to perform and should not be allowed to rescind, — so it seems more satisfactory on the whole to treat the situation as one of a contract coming under the part-performance doctrine and therefore *quasi*-specifically enforceable in equity, though not literally specifically enforceable.[18]

Where an equity is sought to be enforced against the heirs, next of kin, devisees, or legatees, the executor or administrator is not "sought to be charged." The executor was sought to be charged in Emery *v.* Burbank, *supra*.

For a vigorous protest against a too ready acceptance of the claims of one who seeks to recover on an oral contract to devise, see Hamlin *v.* Stevens, 177 N. Y. 39, 69 N. E. 118 (1903).

[17] On that proviso, see Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710 (1896); Winne *v.* Winne, 166 N. Y. 263, 59 N. E. 832 (1901); Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903 (1903).

[18] While equity can refuse to give *quasi*-specific enforcement where to give it would lead to unfortunately harsh results to the promisor's surviving family, the law courts have not, of course, any power to withhold the legal remedy for such a reason. If the contract is not in writing and the Statute of Frauds applies, the law courts escape any difficulty by confining the plaintiff to a *quasi*-contract recovery; but where the contract is evidenced in a writing which is signed by the party to be charged and which otherwise complies with the requirements of the Statute of Frauds, or where the contract is oral and the Statute of Frauds does not apply, the law courts must assess

Contracts for joint, mutual, or joint and mutual wills. — The species of contract to bequeath or to devise which results in a

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damages measured by the value of the property contracted for. Frost *v.* Tarr, 53 Ind. 390 (1876). It is a pity that the law courts did not refuse to enforce any of these contracts, because it is often unfair to enforce them and yet law courts cannot discriminate. It is too bad that the law courts did not confine relief at law to a *quantum meruit* recovery; for the flexibility of equitable relief and equity's sound discretionary award or refusal of its remedies make it more possible for equity than for the law courts to deal satisfactorily with the situation. Compare Owens *v.* McNally, *supra*, where the plaintiff was denied relief in equity on a contract for all the estate of the deceased because of hardship on the deceased's widow, who was entitled to one-half the deceased's estate and who did not learn of the contract till after her husband's death, but where it would seem chancery might have given plaintiff the half of the estate to which, under the California statute of succession, apparently, the widow had no claim, if plaintiff preferred that to a *quasi*-contract recovery. In Burdine *v.* Burdine, *supra*, the contract was on record at the time of the marriage, so the widow was deemed not to be able to show hardship. *Cf.* Dillon *v.* Gray, 87 Kan. 129, 123 Pac. 878 (1912), where no hardship was shown. If in Owens *v.* McNally, *supra*, the contract had been in writing and recovery had been sought on it at law, the court of law would have been hard put to it to keep plaintiff from getting a judgment for the full money value of the estate,—see Roehl *v.* Haumesser, 114 Ind. 311, 15 N. E. 345 (1888), where a claim for breach of a contract to devise one-half of an estate was enforced, — and such a judgment might have left the widow of the deceased penniless.

In Gall *v.* Gall, 64 Hun (N. Y.) 600, 19 N. Y. Supp. 332 (1892), in dismissing a complaint for specific performance, the judges advanced as an extra reason for their decision the illegality, as against his wife, or wife and children, of a man's agreement to will all his property to a third person. Barrett, J., for himself and also, it seems, for O'Brien, J., said (p. 606): "The parties, whatever their original understanding, could never have contemplated a restriction upon the decedent's right to marry or to provide for his children in case such marriage was fruitful. Nor could they have contemplated the taking, by the plaintiff, of the decedent's entire estate to the exclusion of any such future wife or child. If such an agreement had been made, it certainly would have been against public policy and void. Whatever agreement was made was necessarily subject to such possibilities and was limited by implication accordingly."

And Van Brunt, P. J., said (p. 607):

"I do not think that the courts will enforce a contract whereby a party deprives himself of all power to bequeath or devise, by will, the property of which he is the owner at death, except in cases of adoption, where the contract is made for the benefit of an infant, and not to the exclusion of children."

That General Term decision was affirmed without opinion in 138 N. Y. 675, 34 N. E. 515 (1893). There is nothing *contra* in Heath *v.* Heath, 18 Misc. (N. Y.) 521, 42 N. Y. Supp. 1087 (1896), where the promise was expressly subject to the dower and distributive personal property interest of promisor's widow, nor in Hall *v.* Gilman, 77 N. Y. App. Div. 458, 79 N. Y. Supp. 303 (1902), or Winne *v.* Winne, *supra*, because in neither of the latter cases was there wife or child.

On the validity of contracts to devise all of one's property, see an article by Mr. Joseph H. Drake in 7 Mich. L. Rev. 318. The difficulty of all who deal with the enforcement of such contracts is to find a way to uphold them in general and yet to deny

joint will, or in a joint and mutual will, or in mutual wills calls for special reference.[19] It was only gradually that a joint and mutual will met with judicial favor,[20] and even to-day the weight of authority is against the probate of a joint will executed on the condition expressed in it that it is not to be effective as a will, or is not to be probated, until the death of the last surviving testator who executes it.[21] The difficulty with a joint or joint and mutual

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recovery, or to apportion it, in extreme cases. While it is true that equity may refuse specific performance, if it has jurisdiction, or give it only on equitable terms, that action of equity is not adequate protection in this country in many cases because of our rule of full damages at law.

[19] A joint or conjoint will may be defined to be one executed by joint owners of property, or one executed jointly by the owners of separate property who treat the property bequeathed or devised or both, as joint for will purposes and accordingly leave it to the same beneficiary or beneficiaries. *In re* Cawley's Estate, 136 Pa. St. 628, 20 Atl. 567 (1890); Frazier *v.* Patterson, 243 Ill. 80, 90 N. E. 216 (1909). In Deseumeur *v.* Rondel, 76 N. J. Eq. 394, 399, 74 Atl. 703, 705 (1909), however, the phrase "joint will" is made to apply only where the property bequeathed or devised in the same document is held jointly, and the phrase "mutual will" is suggested as proper where the property is held separately, *i. e.*, is owned in severalty.

A mutual or reciprocal or counter will, as it is variously called, is a will executed by two or more testators who own separate property or separate interests in the same property, and who make gifts to the survivor or survivors of them. "A mutual will is . . . in effect two [or more] wills, the disposition of each sharer being applicable to his or her half [or other share] of the joint property." Sir Robert P. Collier in Dias *v.* De Livera, L. R. 5. A. C. 123, 136 (1879). The same judge in Denyssen *v.* Mostert, L. R. 4. P. C. 236, 252 (1872), spoke of mutual wills as being in England "of rare occurrence." Where the reciprocal provisions are contained in separate wills executed by the several testators, the plural terms "mutual wills," "reciprocal wills," "counter wills," and "twin wills" are used.

A joint and mutual will is strictly a will executed by two or more testators and containing both reciprocal provisions and a gift to some third person beneficiary or beneficiaries.

A double will is a will executed by two or more testators who have no joint property to dispose of, who reserve full separate rights of revocation, and who have only sentimental reasons for desiring to execute one document instead of separate wills. *In re* Cawley's Estate, *supra.*

[20] The prejudice against unconditional joint wills which made some courts refuse to admit such a will to probate either as the joint will of both parties or as the separate will of each (see Walker *v.* Walker, 14 Oh. St. 157 (1862), and Clayton *v.* Liverman, 2 Dev. & Bat. Law (N. C.) 558 (1837)) has practically disappeared. See Betts *v.* Harper, 39 Oh. St. 639 (1884); *In re* Davis' Will, 120 N. C. 9, 26 S. E. 636 (1897). See also Hill *v.* Harding, 92 Ky. 76, 17 S. W. 199, 437 (1891); Baker *v.* Syfritt, 147 Ia. 49, 54, 125 N. W. 998, 1000 (1910).

[21] See Hershy *v.* Clark, 35 Ark. 17 (1879); State Bank *v.* Bliss, 67 Conn. 317, 35 Atl. 255 (1896). In the latter case it was held that the estate of the first to die must be administered and distributed as intestate estate. In *In re* Raine, 1 Swab. & Tr.

will conditioned in that way seems to be that many courts cannot understand how a will can be a will unless it takes effect as such *eo instanti* the testator dies and unless it can be probated promptly after his death.[22] And with reference to a joint and mutual will there is a further difficulty due to loose language; for a number of courts say that such a will is essentially irrevocable by the survivor,[23] and yet they are unable to get away from the fact that a will by its very nature must remain ambulatory, and hence revocable in the proper way by a competent testator. The real truth of the matter is that such joint and mutual wills, like separate mutual wills, retain the quality of revocability, and if they are revoked, must be denied probate;[24] but equity interferes to prevent

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144, 146 (1858), in holding that the will, that of two brothers, could not be probated during the life of the survivor because all the gifts were to take effect "after both our decease," Sir C. Cresswell called the will "a very singular instrument." As an executor was appointed unconditionally, it would seem that probate might have been granted. In Peoria Humane Society *v.* McMurtrie, 229 Ill. 519, 82 N. E. 319 (1907), the will, so far as it was joint, was expressly conditioned to take effect as the will of both testators, if when both should be dead no individual will had been made, and, since the will as to the one who died first had been revoked by his marriage and was not republished by his subsequent individual will, the court properly refused probate of the joint and mutual will after the death of the survivor when it was offered as the latter's will. No opinion was expressed as to the validity of such a will.

In Schumaker *v.* Schmidt, 44 Ala. 454, 467 (1870), a joint will conditioned not to take effect until the death of the surviving testator is favored in a *dictum*. There B. F. Saffold, J., for the court said:

"The best summary of the law . . . is that two or more persons may execute a joint will, which will operate as if executed separately by each, and will be entitled to, and will require a separate probate upon the decease of each, as his will. But if the will so provides, and the disposition of the property requires it, the probate should be delayed until the death of both, or all, of the testators."

And see Baker *v.* Syfritt, *supra; In re* Lovegrove, 2 Swab. & Tr. 453 (1862).

"But delicate and important questions in this connection remain unanswered; as, for instance, how the first decedent's estate shall meantime be settled and disposed of, and whether a title can in any sense devolve under his will." Schouler, Wills and Administration (1910), § 459.

[22] See Hershy *v.* Clark, *supra*, 23, where it is said that "A will must take effect at the death of the testator, and not at a time still in the future."

[23] See Frazier *v.* Patterson, *supra*, 85. In Stone *v.* Hoskins [1905] P. D. 194, 197, the same thing was said of such a will in case the survivor accepts the provision in his favor made by the deceased. But see Walker *v.* Gaskill, 83 L. J. R. (P. D.) 152 (1914).

[24] A court of probate will either probate a will or deny it probate, regardless of the contract of the maker of the will, unless the contract is also a revoking will, executed as such, or else, as a contract, contains in itself an express revocation of the will which

the injustice of having the testator receive and enjoy property left to him solely because of his promise and then successfully violate on his part the contract under which he, as the survivor, was bound to let his will stand unrevoked.

Equity does not compel the probate of the revoked will, and the court of probate, uncompelled, neither would nor could probate

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meets the statutory requirements for a revocation in writing. Lansing *v.* Haynes, 95 Mich. 16, 54 N. W. 699 (1893); Sumner *v.* Crane, 155 Mass. 483, 29 N. E. 1151 (1892); *In re* Keep's Will, 2 N. Y. Supp. 750 (1888); *In re* Gloucester's Estate, 11 N. Y. Supp. 899 (1890); Houck *v.* Anderson, 14 Ariz. 502, 131 Pac. 975 (1913); Wyche *v.* Clapp, 43 Tex. 543 (1875); Hobson *v.* Blackburn, 1 Add. Eccl. 274 (1822); Pohlman *v.* Untzellman, 2 Lee Eccl. 319 (1757); Walker *v.* Gaskill, 83 L. J. R. (P. D.) 152 (1914). *Cf.* Everdell *v.* Hill, 27 Misc. (N. Y.) 285, 58 N. Y. Supp. 447 (1899). See notes in 27 L. R. A. N. S. 508; 37 L. R. A. N. S. 1196; 12 Prob. Rep. Ann. 63, 71, 72.

While Breathitt *v.* Whittaker, 8 B. Mon. (Ky.) 530 (1848), is supposed to deny the revocability of a joint will, the decision is really one in the law of powers. The will was a joint one in the exercise of a joint power, and it was held that as both donees had to unite in the exercise of the power both had to concur in revoking the ambulatory exercise of the power in the joint will.

In *Ex parte* Day, 1 Bradf. (N. Y.) 476 (1851), Bradford, Surrogate, said:

"An agreement to make mutual wills appears to be valid, and, after the death of either of the parties, irrevocable. . . . This curious subject is admirably discussed in Mr. Hargrave's luminous opinion in the Walpole case [Lord Walpole *v.* Lord Orford, 3 Ves. Jr. 401 (1797)]. It is there conceded, as was indeed established at law in the same case (7 D. & E. 138), that the effect of such an agreement could not be to make a will of that kind irrevocable, for from the very nature of the transaction testamentary dispositions are revocable. But it was contended a compact of that kind could be enforced in equity against the estate of the defaulting party after his decease, on the ground of an attaching equitable trust."

In Robinson *v.* Mandell, 3 Cliff. 169, 20 Fed. 1027, No. 11,959 (1868), Clifford, Circuit Justice, said (p. 1033):

"Where two persons agree each with the other to make mutual wills, and both execute the agreement, it is held that neither can properly revoke his will without giving notice to the other of such revocation. The death of one of the parties in such a case carries his part of the contract into execution, and the better opinion perhaps is that the other party, after that event, if the agreement was definite and satisfactory, cannot rescind the contract. Dufour *v.* Pereira, 1 Dick. Ch. 419; 2 Harg. Jurid. Arg. 272. Both wills, it is agreed, even in a case when the agreement between the respective testators is fully proved, are still in their nature revocable; but the doctrine is, that the parties are under a restriction, each to the other, not to revoke their respective wills so as to secure any undue advantage."

The statement by Clifford, J., quoted *supra*, that neither party to mutual wills can revoke without giving notice to the other, was based on Lord Camden's opinion in Dufour *v.* Pereira, 1 Dick. Ch. 419 (1769), and needs to be qualified even as an equity doctrine. In Stone *v.* Hoskins, *supra*, it is held that notice obtained by ascertaining that the other party has died without performing is enough if the survivor, after getting that notice, is able to alter his or her will also.

it. What equity does is to make the party who, because of the revocation, gets that for which he pays nothing, hold in trust for and convey to the party who would have taken under the will if it had remained unrevoked. It is sometimes said that the will is irrevocable in equity, [25] but the meaning of that simply is that while equity knows that the will has been revoked, it will nevertheless decree that the property shall be held for those who would have taken if the will had not been revoked.[26]

With reference to contracts to bequeath or to devise, whether they are mutual-will contracts or not, it should be noted that the remedy on such contracts is not confined to equity, and indeed exists in equity in the United States only if the legal remedy is in-

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[25] See Brown *v.* Webster, 90 Neb. 591, 603, 134 N. W. 185, 190 (1912).

[26] Dufour *v.* Pereira, *supra;* Bower *v.* Daniel, 198 Mo. 289, 95 S. W. 347 (1906). See Baker *v.* Syfritt, *supra.* But see Allen *v.* Bromberg, 163 Ala. 620, 50 So. 884 (1909) (Statute of Frauds not complied with).

For mutual wills, whether they are joint or several, to be irrevocable in the eyes of equity they must have been executed in pursuance of a contract, and not merely as a coincidence of the unrestrained intentions of the testators. Lord Walpole *v.* Lord Orford, *supra;* Coveney *v.* Conlin, 20 App. D. C. 303 (1902); Edson *v.* Parsons, 155 N. Y. 555, 50 N. E. 265 (1898); Albery *v.* Sessions, 2 Oh. N. P. 237 (1895); Coghlin *v.* Coghlin, 26 Oh. C. C. 18 (1904); Buchanan *v.* Anderson, 70 S. C. 454, 50 S. E. 12 (1905). The proof of such a contract must be clear. Wangea *v.* Marr, 165 S. W. 1027 (Mo., 1914).

In Drischler *v.* Van Den Henden, 49 N. Y. Super. Ct. 508 (1883), where pretermitted heirs were seeking to recover from their mother their share of their father's estate against the mother's claim of a mutual will arrangement between her and the deceased, Ingraham, J., said (p. 511):

"The fact that at the time of the execution of the will in question the defendant made a will leaving all her property to the testator, does not of itself make the wills mutual wills. In order to make a mutual will, the instrument or instruments must be executed by both parties under an agreement to make such disposition of the property of each, that the survivor will be entitled to the property of the one first dying, or the disposition of the property must be in the instrument executed by both of the parties." The last "or" clause should have been omitted to make the statement perfectly accurate. That the contract need not be proved by express language, however, see Everdell *v.* Hill, *supra,* reversed on other grounds in 58 N. Y. App. Div. 151, 68 N. Y. Supp. 719 (1901), and appeal dismissed in 170 N. Y. 581, 63 N. E. 1116 (1902).

The execution of wills by the parties to an oral contract to make mutual wills is not such part performance as to take the contract out of the Statute of Frauds. McClanahan *v.* McClanahan, 77 Wash. 479, 137 Pac. 479 (1913); Edwall *v.* Jesseph, 75 Wash. 391, 134 Pac. 1041 (1913). But see Brown *v.* Webster, *supra,* where in the majority opinion it was deemed that the wills were executed as "an integral and important part of the contract" and that "the execution of the wills satisfied the Statute of Frauds," though in a specially concurring opinion one judge refused to say more

adequate.[27] If the contract is in writing, as required by the Statute of Frauds, its breach will justify a claim against the estate or, where the local statutes permit, an action at law will lie on it.[28] Wherever the sole beneficiary of a contract may sue upon it, the third person who by the contract was to receive a legacy or devise may present a claim against the promisor's estate or sue for the contract's breach.

What has been said about contracts to bequeath or to devise is in general applicable to contracts to die intestate. If the contracts meet the statutory requirements, claims against the estate of the deceased promisor for the breach of such contracts will be upheld or actions at law for their breach will lie, and, if the legal remedy is not adequate, suits in equity may be maintained. A contract to die intestate cannot literally be enforced specifically at the suit of the heir or next of kin with whom the ancestor made it, but if the ancestor, in breach of his promise, has died testate and by his will left the property or part of it to others, equity will enforce an equity in favor of the promisee,[29] *i. e.*, will give him *quasi*-specific performance.

Bequests, devises, or intestacies secured by oral or unattested written promises to apply for others some or all of the property so obtained. — The foregoing observations prepare the way for the consideration of the cases of devises, bequests, or intestacy obtained by the recipient's oral or unattested written promises. The contract-to-bequeath-or-devise cases, which we have just been considering, where the person contracting to bequeath or to devise does not carry out the contract are, naturally, much like the cases where there is a bequest or devise given in consideration of the promise of the recipient to devote the property to specified uses. In the

than that the wills *might* "furnish written evidence to take the oral contract without the Statute of Frauds."

[27] See n. 12, *ante*.

[28] Wellington *v.* Apthorp, *supra;* Jenkins *v.* Stetson, 9 Allen (Mass.) 128 (1864); Carroll *v.* Swift, 10 Ind. App. 170, 37 N. E. 1061 (1894). In Burgess *v.* Burgess, 109 Pa. St. 312, 316, 1 Atl. 167, 168 (1885), Clark, J., said:

"A contract to devise may in some instances be enforced by decree for specific execution — Brinker *v.* Brinker, 7 Barr. (Pa.) 53 (1847) — or it may furnish ground for an action, in case of a breach, and the damages will be computed according to the same measure, as if the action were for breach of a contract to convey."

Cf. Riley *v.* Allen, *supra*, 503.

[29] Jones *v.* Abbott, 228 Ill. 34, 81 N. E. 791 (1907). *Cf.* Taylor *v.* Mitchell, 87 Pa. St. 518 (1878).

latter cases, however, while there is often a contract in form, it is perhaps doubtful whether there is a contract in fact.

In the usual case of a devise or legacy on an oral promise the testator says, in effect: "If I make you devisee or legatee in the will which I am about to make, or if I do not revoke the devise or legacy I have provided for you in the will which I have made (and I reserve the right to do as I please in the matter), will you hold the property in trust for so and so [or pay or convey such and such part of it to so and so]"; and the prospective devisee or legatee expressly or by conduct answers that he will. If a contract is to result from that kind of conversation, which at least gives the illusion of a contract, it must be on the theory that the prospective devisee or legatee really makes an offer to perform, and that the testator accepts it by making his will in the devisee's or legatee's favor, by refraining from revoking it thereafter, and by dying. It is an offer of a unilateral contract not accepted until the testator dies with the will in the devisee's or legatee's favor unrevoked.

But a promise which cannot bind the promisor until the very fractional part of a second in which the promisee dies and his will becomes effective is at the best a peculiar thing, and is so like an acceptance of an offer of contract sent after the offeror's death that it may well be deemed in a common-law jurisdiction not to be enforceable as a contract. In some jurisdictions the promisor in these will and intestacy cases would be estopped to deny acceptance in time,[30] just as occasionally in other contract actions a promisor is deemed estopped to deny that there was consideration for his promise.[31] Unless the estoppel theory is to be adopted, it would seem as if in these will or intestacy cases, where the person expected to make the will or to die intestate makes no promise and reserves entire freedom to change his mind, a common-law court cannot properly regard contracts as entered into; for in a common-law jurisdiction death cannot properly serve to mark the completion of the act of willing or forbearing to will which is to bind the promisor by a contract, since until the death of the testator or intestate the promisor is not bound and after his death there is no existing promisee to be bound to.

The problem is just the sort that would have delighted the

[30] See McDowell *v.* McDowell, 141 Ia. 286, 119 N. W. 702 (1909).

[31] See Ricketts *v.* Scothorn, 57 Neb. 51, 77 N. W. 365 (1898).

medieval lawyer and that makes the modern lawyer and judge impatient, and were the result of the no-contract view to be a denial of any relief or even of adequate relief, to the beneficiary of the promise, all American common-law courts would doubtless adopt the estoppel view or qualify their view of the effect of death sufficiently to find a contract, as some have already come near doing, if not done.[32] There is, however, sufficient relief furnished in

[32] The cases where the beneficiary has insisted on a contract remedy are relatively few. The earliest seems to have been Rookwood's Case, Cro. Eliz. 164 (1590), the full report of which was as follows:

"Rookwood, having issue three sons, had an intent to charge his land with four pounds per annum to each of his two youngest sons for their lives; but the eldest son desired him not to charge the land, and promised to pay to them duly the four pounds per annum; to which the two younger sons, being present, agreed; and he promised to them to pay it. And for non-payment after the death of the father, they brought an assumpsit. The whole court held clearly that it was well brought and that it was a good consideration; for otherwise his land had been charged with the rents."

The promise by the father should doubtless be interpreted as a promise not to charge by deed or will, *i. e.*, to let the lands go to the heir by descent uncharged.

The case of Dutton *v.* Poole, Vent. 318, 2 Lev. 210 (1678), was one where a father, who was going to dispose of a wood to raise a portion for his daughter, refrained from doing so, and allowed the property to descend to his son and heir, on the promise of the latter to pay his sister £1000, and the daughter was allowed to recover in assumpsit against the son.

But the English courts in Rookwood's Case and Dutton *v.* Poole did not discuss the question whether there was a binding contract or not, but considered solely the question whether the plaintiffs were sufficiently parties to the contract, conceded in each case, to sue upon it. The nearness of the relationship of the beneficiary to the promisee and all that such nearness implied,— the supposed consideration of love and affection which led the promisee to exact the promise for the benefit of plaintiff and the supposed moral consideration found in the promisee's moral duty to provide for the plaintiff, — were deemed to justify a judgment for plaintiff. But Dutton *v.* Poole is no longer law in England and has not been law there since 1861, when the case of Tweddle *v.* Atkinson, 1 B. & S. 393, ended all controversy about the matter, and Rookwood's Case can be law there only if the fact that the younger sons were present and "agreed," made them parties to and not mere beneficiaries of the contract claimed, if one there was. See Wald's Pollock on Contracts, 3 ed., p. 241; West Yorkshire Darracq Agency, Limited *v.* Coleridge [1911] 2 K. B. 326.

Since in England even the sole beneficiary of a contract cannot sue on it, and mere nearness of relationship to the promisee, or moral consideration characterizing the beneficiary, no longer makes him a party to the contract or within its consideration, the beneficiary of an oral promise made to secure a legacy or devise can have no remedy there as such beneficiary, either at law or in equity, against the promisor. His sole remedy there is in equity as *cestui que trust* of a constructive trust.

In the United States, in most of which the sole beneficiary of a contract can sue upon it, the question of a right to sue at law in these legacy, devise, and intestacy cases seems seldom to have arisen. The reason probably is that nearly always the equity

chancery under its constructive-trust doctrine, the sounder view is that equity does not specifically or *quasi*-specifically enforce a

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remedy is available and is so much more satisfactory than the legal. The theoretical difficulty of finding a contract does not seem to trouble the courts apart from the matter of consideration.

In Parker *v.* Urie, 21 Pa. St. 305 (1853), where a son died intestate in reliance on the promise of his father, who received the intestate's estate, to pay plaintiff $500 out of the son's estate, the court thought that there was a contract which the father was "bound, in conscience and law, to fulfill," but yet recognized that to the time of his death the son had the right to change his mind and make a will cutting out the father. In that event, said Lewis, J., for the court, the promisor "would be relieved from the performance of his contract, not because there was no original consideration for it, but by reason of the failure of the consideration expected, and which formed the inducement to enter into the engagement."

But in Parker *v.* Urie the promisor, after the decease of the promisee and on his own deathbed, made to the beneficiary what the court deemed a valid oral partial assignment of a bond, the amount assigned being the amount which the assignor was to pay the beneficiary, and the defendants as executors had collected the whole bond; so on that theory of the case an action at law was clearly proper. Any tenable theory to support the case may be adopted, because the action was an amicable one, "the case to be tried without regard to the form of action or the proper joinder of parties."

In Gaullaher *v.* Gaullaher, 5 Watts (Pa.) 200 (1836), it was held that a legatee who, in order to prevent the alteration of testator's will in plaintiff's favor, had agreed to give the plaintiff the legatee's notes for $5,000 and to pay the notes, and who actually had given the notes, could not successfully maintain the defense of no consideration. The court said that, if the legatee had not given the notes, chancery would have declared a trust, "and it would be strange if a moral obligation, sufficient to raise a trust, were not sufficient to sustain a promise." The merger of the equitable cause of action in the notes, *i. e.*, the discharge of that cause of action in those notes, was of course sufficient valuable consideration for them.

In Williams *v.* Fitch, 18 N. Y. 546 (1859), a count for money had and received was sustained at the suit of the beneficiary against the executor of the one who had made the promise in order to gain succession by the promisee's intestacy. The promisor was trustee of a fund for his daughter, and he not only made her the promise to hold the fund for the plaintiff, but after the intestacy of the daughter he held the fund for the plaintiff as the latter's property and loaned portions of it out in the plaintiff's name. That case was decided in 1859, and therefore after the reformed procedure introduced by the New York Code of Procedure of 1848 had been in operation for some years; but even as a common-law decision it could perhaps be justified on the ground that the promisor became a trustee of personalty for plaintiff and that "where the trust is fully executed and there remains nothing to be done but for the trustee to pay over the amount to the *cestui que trust*, an action at law may be maintained in all states for the payment of the amount found due." 2 Perry on Trusts, 6 ed., § 843.

In Illinois, under the influence of the moral consideration idea, an action at law was allowed in Lawrence *v.* Oglesby, 178 Ill. 122, 52 N. E. 945 (1899), where the circumstances were much like those in Rookwood's Case, *supra*. A father, who had made his will mainly in favor of his son, called his son and daughter together and got the son to promise to pay his sister "$1,500 not mentioned in my will." The court found

contract in such cases, but simply raises a constructive trust,—[33] and since the common-law court does not need to act, it should re-

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the son's promise to be supported by the consideration of "the honesty and rectitude of the duty of compliance," and enforced it. The real consideration, if there was one, was the father's dying without altering his will in such a way as to give his daughter the $1,500. The daughter, like the younger sons in Rookwood's Case, was either a party to the contract, if there was one, or else a sole beneficiary. The Illinois court, which is quite rigid about requiring in the constructive-trust-for-breach-of-oral-trust-or-promise will cases active solicitation on the part of the legatee or devisee, or actual fraudulent intent at the time of making the promise, or breach of some special confidential relationship, abandoned these tests when the question was one of recovery at law for breach of the promise. As Phillips, J., for the court said (178 Ill. 122, 129):

"To hold the son could not be required to comply with such promise as not being based on a sufficient consideration would be to disregard the fact that the will was merely ambulatory and could be changed by the testator so long as he was of sound and disposing mind, and that he must have known that fact, and would be, in effect. to aid the appellant in the perpetration of a fraud on appellee."

If the Illinois Supreme Court would only carry that fraudulent retention idea over into the trust cases, where it belongs, its decisions in those cases would no doubt become satisfactory. For equity to grant relief a contract does not have to be found, since unconscionable retention of property by the defendant is enough.

It should be noted that the common-law courts have modified their view of the effect of death sufficiently to find a contract between the testator and a legatee or devisee for the benefit of a third person where the will gives a specific legacy or a devise on the condition expressed in the will that the legatee or devisee shall pay a specified sum to the intended beneficiary. If the legatee or devisee accepts the gift provided in the will, he becomes personally liable to the intended beneficiary, who may sue at law and recover the full amount specified, even if it exceeds the value of the legacy or devise. See cases cited in Wald's Pollock on Contracts, 3 ed., p. 252, where Professor Williston points out that "even in England there are cases that have never been overruled in which a beneficiary was allowed to recover in an action of debt against a devisee whose devise was left upon the condition that he should make a payment to the beneficiary." On the personal liability of devisees for charges imposed by the will, see 129 Am. St. Rep. 1056, n.

[33] In Heinisch *v.* Pennington, 73 N. J. Eq. 456, 68 Atl. 233 (1907), where for various reasons equitable relief was not given, Emery, V. C., said (p. 462):

"This equitable remedy is not by way of specific performance of a contract, and a personal decree for performance and relief, based on such grounds, would seem clearly to disregard the express provisions of the statutes, both of frauds and wills. I have not been referred to, nor do I find, any case where relief was granted against the legatee in such cases, except by seizing, either in his hands or of those who held for him, the property devised or bequeathed to him for the purpose of impressing it with a trust." See also Belknap *v.* Tillotson, 82 N. J. Eq. 271, 88 Atl. 841 (1913).

For the same general reason it was held in Winder *v.* Scholey, 83 Oh. St. 204, 93 N. E. 1098 (1910), that a suit to enforce a trust against legatees, who obtained a bequest on the promise of one made for all before the will was executed, was not on a contract express or implied and so was not barred by the six-year Statute of Limita-

fuse to stretch its principles to find a contract which, if found, would be practically undistinguishable from an unattested will.

The ordinary contract to devise or to bequeath or to die intestate, whether the contract is unilateral or bilateral, is binding prior to the death of either contracting party and so cannot be confused with a will; but this peculiar unilateral contract, if it is a contract, has no existence prior to the testator's or intestate's death. It is as ambulatory as a will or as a gift *causa mortis*, but it lacks the delivery prerequisite to a gift *causa mortis*. There is, to be sure, one prejudicial *ante mortem* act in the case of a will made and allowed to become final in exchange for a promise, namely, the making of the will; but that ambulatory prejudicial act is exactly the one involved in the case of every will entitled to probate. If the court had to be asked to enforce the promise specifically, or even *quasi*-specifically, it might well refuse because of the close resemblance of the enforcement to the supplying of a will; but fortunately that difficulty may be avoided by refusing to ask the court to enforce the promise as such and by asking it, instead, to raise a constructive trust. In England, where the sole beneficiary of a contract, as such, cannot sue upon it, nothing but a constructive trust will serve to prevent the promisor's unjust enrichment:

Where an ancestor has died intestate, and refrained from making a will only because the heir or next of kin promised to carry out his testamentary wishes, there is the same difficulty of finding a contract *eo instanti* that the intestate dies that we found in the legacy and the devise cases. Moreover, there is a similar question whether the contract, if it were to be conceded to arise, would be

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tions. The cause of action was held to be for relief on the ground of fraud and hence one which would not accrue until discovery of the fraud.

In Golland *v.* Golland, 84 N. Y. Misc. 299, 147 N. Y. Supp. 263 (1914), Cardozo, J., said (p. 267):

"The principle is now a settled one in this state that, where a devise is induced by the promise, express or implied, of the devisee, to devote the gift to a lawful purpose, a secret trust is created; and equity will compel him to apply the property in accordance with the promise by force of which he procured it. . . . A court of equity in such cases exerts its power, not merely because there has been a breach of contract, but because the promise has been used as an instrument to induce the promisee to part with his property, so that the retention of it by the promisor in violation of the promise would result in an unjust enrichment and would constitute a fraud. It is not the promise only, nor the breach only, but the promise and the breach combined, with the extortion of property from the owner upon the faith of the engagement, which puts the court in motion."

legally valid. The statutes of descent and distribution exhibit the state policy as to the descent and distribution of the property of intestates in the absence of a will, and a contract which does not spring into existence until the death of the intestate, and which is effective solely as a testamentary disposition, is perhaps too like an unattested will properly to be enforceable specifically or *quasi*-specifically. But a constructive trust may well be enforced to prevent unjust enrichment. In England, because the sole beneficiary of a contract cannot sue upon it either at law or in equity, nothing but a constructive trust will meet the needs of the situation.

We may conclude then, though the matter is far from being free from difficulty, that on principle bequests or devises obtained by promises made to the testators by the legatees or devisees, and intestacies brought about by promises made to the intestates by the heirs or next of kin, do not properly complete contracts for breach of which an action for damages or a bill for specific performance, or even a bill for *quasi*-specific performance, will lie. Some courts, however, deal with them as if they constitute contracts.[34]

But even if they are not contracts, may not the promisors be estopped to deny that they are contracts? If there is such estoppel, and the view that there is has been advanced,[35] it is estoppel by

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[34] See n. 32, *ante*. The fact of the matter would seem to be that, in these will and intestacy cases, the parties contemplate a unilateral arrangement, and if the legacy, devise, or intestacy which is to be the consideration for the promisor's obligation is not forthcoming, there never is an obligation binding on the promisor. On the other hand, if it is forthcoming, there is a clear equitable duty, but not one, on principle at least, enforceable at law.

[35] In McDowell *v.* McDowell, *supra*, a suit to establish and quiet title, the doctrine of estoppel was invoked to evade the defense that the Statute of Wills was not complied with and that the statutes of descent must govern. The case was one where a dying man told his wife and his mother that he desired his wife to have all his property, and his mother in reply to his question to her if that was all right told him that it was. In consequence he made no will, and in holding the mother estopped to claim under the statutes of descent, Deemer, J., for the court, said (p. 288):

"Unless our statutes of descent are to be regarded as absolute and as inflexible as the laws of the Medes and Persians, the facts recited should estop the defendant from claiming any interest in her son's estate. . . . The general rule announced by the decisions is that a property right, created in favor of one by an estoppel, is superior to the Statute of Frauds and the statutory provisions

promise, and that is a dubious kind of estoppel. Moreover, the estoppel theory does not make it any more advisable to allow an action at law; and since relief should be allowed only in equity, it would seem to be simpler and sounder to put the estoppel theory to one side and to adopt the constructive-trust theory, which the estoppel theory really cloaks.

It is not properly as a contracting party, nor as one estopped to deny that he contracted, but as a constructive trustee because of his unjust enrichment, that a legatee or devisee who got the property under the will, or an heir or next of kin who got it by intestate succession, solely by virtue of his promise, and now is keeping it as his own, while refusing to carry out his promise, is decreed against. In other words, the promise as such is not enforced and the will as such, or the intestate succession as such, is not interfered with, but there is what has been called "a secret trust" recognized and enforced by chancery because of the legatee's or devisee's or heir's or next of kin's fraudulent retention of the bequeathed or devised or unwilled property in repudiation of his promise.

In *Sweeting* v. *Sweeting*, [36] Sir R. T. Kindersley, V. C., thus stated the general trust doctrine where there is a devise on a secret trust:

"Now what does the term 'a secret trust' mean? It means that there has been a contract, agreement, or understanding between the testator and A. B. that, if the property is devised to A. B., he will treat it in a particular manner; and it is called a secret trust simply because it is not expressed in the will; not because no person knows of it, for it may have been arranged before fifty witnesses. It means that upon the face of the will, the devise being absolute, there is before the will something,

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with reference to the execution of wills and conveyances of real estate and personal property."

And again (p. 290):

"This, as we have said, makes out a very clear case of estoppel. The foundation of this doctrine is equity and good conscience. And its object is to prevent the unconscientious and inequitable assertion and enforcement of claims or rights which might have existed or been enforced by other rules of law unless prevented by estoppel. In practical effect there is, from motives of equity and fair dealing, the creation and vesting of opposing rights in favor of the party who gets the benefit of the estoppel. Horn *v.* Cole, 51 N. H. 287."

The estoppel idea was doubtless back of the decision in Lawrence *v.* Oglesby, discussed in n. 32, *ante*.

[36] 10 Jur. N. S. 31, 32 (1864).

either *vivâ voce* or written, constituting an engagement on the part of the devisee not to avail himself of the devise, but to apply it in a particular manner.[37]

"Supposing A. devised to B. in fee, and B. agreed to hold it for the benefit of C., C. cannot go into a court of law and claim to recover by ejectment; but he can come here and say, 'It is true that I cannot ask a court of equity to import into the will anything which is not in it, but it is against conscience of, and a breach of, that faith which is due between man and man, that his devisee, who accepted the devise upon an agreement for my benefit, should turn round and say, 'I am the owner, and there is nothing you can look at beyond the devise in the will in my favor.' ' The court of equity will attach a trust to the devisee as a consequence of his engagement with the testator; not because the testator intended the property to be so held. For if the testator, without any understanding with A. B., devised his estate to him, and expressed in writing, by a codicil not duly executed, that his intention in devising to A. B. was that he should hold the property for C. D., that would not enable C. D. to come here and say that A. B. was trustee for him. A. B. would be entitled to say, 'There is the will; if you bring parol evidence of the testator's intention to devise for the benefit of some one else, you are violating the Statute of Frauds and importing into the will that which is not therein.' The expression 'parol' means not merely that which is verbal, but it may mean 'written.' But no court, either of law or equity, can look out of the devise as to intention, unless an engagement or understanding can be made out on the part of the devisee to accept it on such a footing, or unless he was aware of the testator's intention, and either in words or tacitly accepted it."

The distinction between adding to the will and enforcing a secret trust is clear, even though the same practical consequences may follow from the latter as from the former. It is true, however, that the courts sometimes come very near reading into the will the unattested provisions found in the promise of the legatee or devisee. Perhaps the best illustration of that is found in the case of *In re*

[37] *In re* O'Brien *v.* Condon, [1905], 1 Ir. R. 51, 56, the Master of the Rolls, Sir Andrew Marshall Porter, said:

"This is a typical illustration of a secret trust. That phrase does not necessarily mean a trust of a clandestine nature, or one that is suppressed from the world. It only means a trust which is not disclosed on the face of the will itself."

That case held that a witness who is a beneficiary under a secret trust may still take under the trust. But see *In re* Fleetwood, 15 Ch. D. 594 (1880) *contra*. The reason why the beneficiary of the secret trust may take is because he does not take under the will, but under the decree of equity.

Maddock,[38] where Cozens-Hardy, L. J., stated the contract, estoppel, and trust theories which we have already discussed. In that case the testator's intended gifts to third persons out of a specified part of the residue were expressed in a separate written memorandum which the residuary legatee and devisee had assented to, but the gifts were not mentioned in the will. The residuary personal estate not mentioned in the memorandum proved insufficient to pay the debts, and then the question arose whether the secret trusts must bear any part of the deficiency. It was held that the debts must be paid first out of that part of the residue of the personalty not affected by the trust, and then the deficiency must be borne ratably by the specified unattested-trust part of the residue (treated as a specific bequest of that part) and the real estate. That was to prevent the residuary devisee, who was also constructive trustee, from making his *cestuis que trust* stand the whole deficiency, which Collins, M. R., considered would be "committing a fraud."

Cozens-Hardy, L. J., in delivering his separate concurring opinion, said (pp. 230–232):

"It is necessary to consider upon what principle the undoubted rule of the court, that effect is to be given under certain circumstances to declarations in writing not properly attested, is based. It is clear that no unattested document can be admitted to probate or treated as part of the will. It is established that a devisee or legatee, who is entitled absolutely upon the terms of the will, is in no way affected by the existence of a document showing that he was not intended to enjoy beneficially, if he had no knowledge of the document until after the death of the testator. Such a memorandum may or may not influence him as a man of honor, but no legal effect can be given to it. If, however, the devisee or legatee is informed of the testator's intention, either before the will in his favor is made or at any time afterwards before the testator's death, different considerations arise. It is sometimes said that under such circumstances a trust is created in favor of the beneficiaries under the memorandum. At other times it has been said that the devisee or legatee under the will is bound by contract, express or implied, to give effect to the testator's wishes. Now the so-called trust does not affect the property except by reason of a personal obligation binding the individual devisee or legatee. If he renounces and disclaims, or

[38] [1902] 2 Ch. 220.

dies in the lifetime of the testator, the persons claiming under the memorandum can take nothing against the heir at law or next of kin or residuary devisee or legatee. . . .[39]

"Another way of arriving at the same conclusion is to say that the devisee or legatee is estopped by his conduct from denying that the memorandum is a part of the will.

"But, whether the true principle be trust, or contract, or estoppel, it seems to me that, as between the devisee or legatee and the persons interested under the memorandum, all the same consequences must follow as would follow if the memorandum had in fact formed part of the will.

"Applying these principles to the present case, Miss Washington, who attested the memorandum, must be taken to be subject to a personal obligation to give effect to it, precisely as if it had been duly executed as a codicil and admitted to probate."

The difficulty in the legacy and devise cases is to find a satisfactory place to draw the line. Take three situations:

(1) A testator tells his intended legatee or devisee what he wants done and gets his promise that it will be done, if the testator either makes him legatee or devisee or leaves unrevoked a will already made which names him as legatee or devisee, and the testator, relying on the promise, leaves the property to him. There, if the legatee or devisee refuses to perform, a trust is enforced in favor of the intended *cestui que trust.*

(2) The same as (1), only the legatee or devisee makes no promise, but testator tells the legatee or devisee his wishes, assumes such a promise from the legatee's or devisee's silence, and acts on it. There, if the legatee or devisee refuses to perform, a trust is enforced in favor of the intended *cestui que trust.*

(3) The testator tells the legatee or devisee he is to hold in trust for a *cestui que trust* to be named by the testator in a letter later. After the testator's death a letter addressed to the legatee or de-

[39] *Sed quaere* in the case of renunciation or disclaimer. Is not the legal interest in the legatee or donee from the time of testator's death until the renunciation or disclaimer, and is not the latter in effect, — equity is concerned with substance and not mere form, — a conveyance to a donee? And what of the situation where the legatee or devisee who promised dies in the testator's lifetime, leaving children who take by virtue of the common state statute giving them the interest which their parent would have taken if he had survived the testator, and who learn of their parent's promises only after the testator's death?

visee and naming the *cestui que trust* is found with the will, but the legatee or devisee has not seen the letter nor been told its contents in the testator's lifetime. A trust will not be enforced in favor of the intended *cestui que trust*, nor can the legatee or devisee keep for himself, but he will hold for the heirs, next of kin, or residuary devisees or legatees.

Why find a trust for the intended *cestui que trust* in case (2) and not in case (3)? But for the Statute of Wills there would be no reason. In case (3), however, the legatee or devisee knew nothing of the particular *cestui que trust* until after the testator's death, when to recognize the writing as having the effect of naming them, against the legatee's or devisee's objection, would be to give it the same effect as if it were a codicil, although it is unexecuted as one. The testator's expectations are defeated in case (3) if the legatee or devisee sees fit not to realize them,—indeed the English courts will not let the legatee or devisee realize them if he wants to,[40] — but the statute permits of no compulsion on the legatee or the devisee in favor of the intended *cestui que trust*, because those expectations were not expressed in proper testamentary form. It is not to carry out the testator's intentions that a constructive trust is enforced, in any case of the bequest or devise on an oral trust, but solely in order to prevent the unjust enrichment of the legatee or devisee; and while it is clear that the legatee or devisee must hold in trust for some one, the court of chancery, in designating the constructive *cestui que trust*, must pay due regard to the general purpose of the statute governing wills. When a constructive trust is enforced it is because, to borrow the language of Lord Romilly, in the deed case of *Davies* v. *Otty*:[41] "It is not honest [of the grantee or devisee] to keep the land" or other property; but that only points out the trustee and the *res*, while the *cestui que trust* must be selected in a sound way.

The real difficulty in every case is to find out by competent evidence whether the legatee or devisee is unjustly enriched and, if he is, at whose expense. In cases (1) and (2) the legatee or devisee induced the testator's action by his express or tacit promise, and for him in breach of that promise to keep for himself the thing bequeathed or devised would be to profit by a breach of faith at

[40] *In re* Boyes, L. R. 26 Ch. D. 531 (1884).

[41] 35 Beav. 208 (1865).

the expense of the intended *cestuis que trust*, — those sole beneficiaries of the promise whose previously inchoate rights as beneficiaries become irrevocable when the legacy or devise takes effect by testator's death; but in case (3), while the enrichment is actually at the expense of the intended *cestuis que trust*, the court is unable to learn who those *cestuis que trust* are in any way that it is not inconsistent with the statute as to wills to give effect to, against the legatee's or devisee's objection, and accordingly the court, even as a court of equity, is as unable to name them as *cestuis que trust* against the legatee's or devisee's objection, or to charge the conscience of the legatee or devisee with any duty to them, as if the testator had never named them, though the court is not, on principle, unable to permit the legatee or devisee to undertake the intended duty to them. This last qualification is made with some hesitancy, but seems right on principle. Before the court can charge the legatee or devisee as constructive trustee for anybody it must find that he is unjustly enriching himself at the expense of some one; and if it is the fact that he is not enriching himself, but is carrying out the wishes of the testator, equity ought to let him do so, because in that case there is no occasion for the raising of any constructive trust.[42] The matter is at least debatable.[43] In case (3) the legatee or devisee knew that he was to hold in trust, and therefore cannot conscientiously claim the property for himself, so he must hold in trust for some one.[44] Where

[42] The English view is that, in the absence of communication of the testator's wishes made to the devisee in the testator's lifetime, "the Statute [of Wills] prevents the court from looking at the [unattested] paper-writing in which the testator's intentions are expressed." Vice-Chancellor Sir W. Page Wood, in Wallgrave *v.* Tebbs, 2 Kay & J. 313, 327 (1855). But before the equity court can act at all, as the English court does act in favor of the heir or next of kin, it must find a basis for a constructive trust in the devisee's conduct; and if he is actually carrying out the testator's intentions, there is no such basis. The language just quoted is sound only where the devisee refuses to perform and claims the devise for himself, or where the will gives the property "in trust" without stating expressly for whom, and the court takes the position that there is an express and not a constructive trust thereby constituted for the heir or next of kin. For the last point of view, in effect, see Balfe *v.* Halpenny, [1904] 1 Ir. R. 486.

[43] The strongest argument for letting a trustee carry out the wishes of the creator of the trust, if the trustee desires to do so, even if they are not communicated to him in the testator's lifetime, and even if the trustee cannot be compelled to carry them out, is found in Ames' Lectures on Legal History, pp. 285–297. See same article in 5 HARV. L. REV. 389–402.

[44] If he is not given the least intimation in testator's lifetime that he is to hold in

he refuses to hold for the ones intended by the testator, or is not allowed to carry out the testator's wishes as embodied in the unattested letter, the courts compel him to hold for the next of kin, residuary legatee, heir or residuary devisee.[45]

It is, of course, clear that in cases (1) and (2), where the memory and conscience of the legatee or devisee can be made to yield not

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trust, or if what the testator says to him is too general to count, and the gift to him in the will is not expressly "in trust," he takes of course free from any trust. See McCormick *v.* Grogan, L. R. 4 H. L. 82 (1869). In *In re* King's Estate, L. R. 21 Ir. Ch. 273 (1888), where a testatrix bequeathed £200 to her two sisters, Letitia and Martha "to spend as I shall, by word of mouth, direct during my lifetime," and the testatrix said nothing to Letitia and made to Martha only some general statements about wanting to leave "something" to her nephew "young James," but did leave an unattested letter found after her death saying the nephew was to have £100, Monroe, J., said (p. 279):

"But Mr. Meldon argued that, entirely irrespective of the time at which the wishes of the testatrix were communicated to them, their consciences must be held to be affected, and that they cannot be permitted to take property beneficially which their testatrix intended for others.

"Is this distinction supported by principle or authority? I think the two sisters do not stand in precisely the same position. No communication of any kind appears to have been made to Letitia by her sister Anne during her lifetime. Martha does not appear to have told Letitia that Anne had made any statement on the subject of her affairs. All Letitia knew was that a paper or letter was found with the will, requesting her and her sister to spend certain sums in a particular way. She had given no undertaking so to spend the money. In refusing to spend it in the way directed she was guilty of no fraud; she was under no obligation, legal or equitable. Therefore, as regards any share given to Letitia under the will, she was bound by no trust; she took beneficially and her interest passed to the mortgagee. It only remains to consider whether Martha took her share of the £100 intended for 'young James' with the liability of carrying out the trust imposed, or sought to be imposed, by the verbal communication or the letter. Would she be guilty of a fraud on the testatrix if she sought to hold the money for herself beneficially? It is to be remembered that Martha was not informed that a legacy had been or was to be left to her to be applied in a particular way. Anne merely said that she wished to leave *something* to 'young James,' as if she was about to make her will and give him a legacy directly. According to the terms of the will, the sum of £200 was to be applied as the testatrix should 'by word of mouth direct during her lifetime.' The testatrix never did during her lifetime direct how a sum of £200 should be applied. I cannot see that Martha, who received no directions as to the expenditure of any particular sum, who gave no undertaking as to its application, could now be held guilty of a fraud on her sister if she refused to carry out the directions in the letter only discovered after her death."

[45] See *In re* Boyes, *supra*, where, as the property was personalty, the trust was decreed for the next of kin. Kay, J., said (p. 537):

"I cannot help regretting that the testator's intention of bounty should fail by reason of an informality of this kind." There the legatee wanted to carry out the unattested intentions, but the court would not let him. As already suggested, the soundness of that refusal may well be doubted.

merely the information that a trust or the equivalent was intended, but also the names of the persons to take and the amounts or interests they were to take, the statute governing wills is not infringed when equity tells the legatee or devisee that he must hold in trust for those intended to take. But why should equity tell him to hold for them rather than for the next of kin or the heir? Using the analogy of the contract cases, it may be said that the legatee, or devisee, who cannot hold for himself, because to do so, in breach of his promise to hold for or convey to the intended beneficiary, would be dishonest, must hold on a constructive trust for the intended beneficiary, who is in the same situation as is the sole beneficiary of a contract in that he alone is substantially damaged by the breach of promise. But when that is said, not all is said that needs to be said. That analogy is of no use in England, for there the sole beneficiary of a contract has, as such, no right to sue either at law or in equity on the contract. And even in this country the late Dean James Barr Ames of the Harvard Law School was unable to find any basis other than tort for giving the intended beneficiary of a devise on oral trust any relief. Except in the case where the legatee or devisee made his promise to the testator with the actual intention of keeping the property in disregard of his promise (in which case Dean Ames considered him to commit a tort which equity should compel him to repair specifically by a conveyance to the intended beneficiary), Dean Ames could see no argument in favor of the intended beneficiary. The case of a devise on an oral trust he considered on all fours with that of a deed on oral trust for third persons. Of the deed and the will cases he said:

"If A. conveys land to B. upon an oral trust for C., and B. refuses to perform the trust, the rights of the parties are easily defined. C. obviously cannot enforce the express trust nor, since he has parted with nothing, can he have relief upon any other ground. But A. . . . may recover his land, for B. may not honestly keep it if he will not fulfill the promise which induced A. to part with it. In Massachusetts A. would probably recover the value of the land instead of the land itself.

"One would expect a devise by A. to B. upon an oral trust for C. to create the same rights upon B.'s refusal to perform the trust as a conveyance by A. to B. upon an oral trust for C., except that, restitution to the testator being impossible, his heir, as representing him, would be

entitled to the reconveyance of the land. But, by a strange inconsistency in the law both in England and in this country, C. is allowed to get the benefit of the trust in spite of the Statute of Frauds. . . . It is quite possible that the courts, in giving C. the benefit of the trust in cases of devises by A. to B. upon an oral trust for C., and in refusing him any relief in cases of similar conveyances *inter vivos*, were influenced by the practical consideration that in the latter case the grantor, recovering his property by the principle of restitution, would still be in a position to accomplish his purpose, whereas in the case of the devise the accomplishment of his purpose would depend wholly upon the will of his heir." [46]

That explanation is undoubtedly forceful; but was Dean Ames right in believing that the majority decisions in the deed cases were sound and that those in the will cases were unsound? To the writer it seems that the courts have been right in enforcing a constructive trust in favor of C. in the will cases, and that the majority jurisdictions have been wrong in refusing to do so in the deed cases.[47] Dean Ames said that to enforce a trust in favor of C. in the will cases, where C. commits only a purely passive breach of promise as distinguished from an active tort, would be to violate the Statute of Wills and the Statute of Frauds. But why so? It cannot be because to enforce a constructive trust in C.'s favor would be to give him just what he would get if the express trust were enforced; for in the case of a deed by A. to B. on an oral trust for the grantor, Dean Ames favored a constructive trust for the grantor and said:

"A., it is true, may by means of this constructive trust get the same relief that he would secure by the enforcement of the express trust. But this is a purely accidental coincidence. His bill is not for specific performance of the express trust, but for the restitution of the *status quo*." [48]

Since in the situation just stated it violates no statute to give A. on constructive trust what he would have had under the express trust, it need violate none in the case of a devise by A. to B. on

[46] Ames, Lectures on Legal History, pp. 429–431. See same passage in 20 HARV. L. REV. 549, 553–555.

[47] See 12 Mich. L. Rev. 429–444.

[48] Ames, Lectures on Legal History, p. 427. See same passage in 20 HARV. L. REV. 549, 551.

an oral trust for C., to give C. on constructive trust what he would have had under the express trust, provided only that a satisfactory reason for enforcing the constructive trust in C.'s favor rather than in that of A.'s heir or residuary devisee is furnished. It is believed that in the will cases such a satisfactory reason is found in the fact that C. is the one, and the only one, substantially injured by the breach of promise. It being plain that the devisee must not be allowed to keep for himself, chancery looks around for an appropriate *cestui que trust*. What more appropriate selection could equity make than the *cestui que trust* who would have been express *cestui que trust* but for the failure of the testator to put his wishes in correct form? The property is devoted to trusts by the testator's and the devisee's joint act, and why not have a trust *cy pres* the testator's intention, just as is done in those cases of charitable trusts where the testator provides that a corporation, to be formed for the specified purposes, shall take? There such a corporation cannot take of right, but if it is formed in a reasonable time, it will be given the property *cy pres* the testator's general intentions.[49] Why make, as *cestui que trust* of the constructive trust, the heir or the residuary devisee, neither one of whom the testator wanted to have the property? Equity, perhaps, cannot properly enforce, even *cy pres*, the details of the express trust, since that might be too like making the unattested will of the creator of the trust take effect; but, since to prevent fraudulent enrichment it must declare a constructive trust, it can name as the *cestui que trust* of that trust the very person intended to be *cestui que trust* of the express trust, and therefore the one injured by the fraudulent acts of the trustee.[50] The reason why nearly all of the courts enforce a trust

[49] Gray's Rule against Perpetuities, 2 ed., § 607. See Sinnett *v.* Herbert, L. R. 7 Ch. App. 232 (1872). *Cf.* Wallis *v.* Solicitor-General for New Zealand, [1903] A. C. 173. "When a definite function or duty is to be performed and it cannot be done in exact conformity to the scheme of the donor, it must be performed with as close an approximation to that scheme as reasonably practicable, and thus enforced. It is the doctrine of approximation. It is not confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for; and it is an essential element of equity jurisprudence. The doctrine of *cy pres*, in its last analysis, is found to be a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor." — Sanborn, D. J., in Tincher *v.* Arnold, 147 Fed. 665, 675 (1906).

[50] As was said by the court in DeLaurencel *v.* DeBoom, 48 Cal. 581, 586 (1874),

in favor of C. in the devise cases, and why a majority of them do not do so in the deed cases, in the absence of fraudulent intent at the time of taking or of a special confidential relationship between grantor and grantee, is that in the will cases the death of the testator makes evident to the courts what in the deed cases the presence of the living grantor often conceals; namely, that the party to suffer by the breach of trust is the intended *cestui que trust* and not the one who furnishes the property and that, since the unjust enrichment of the trustee, to prevent which a constructive trust is raised, is at the expense of the intended *cestui que trust*, he should be selected by the court of chancery as the *cy pres* constructive-trust *cestui que trust*.[51] No doubt, in cases where wills are concerned, it is easier to give due weight to the intentions of the supplier of the property than it is in cases where deeds are used to transfer the property; but in both cases chancery is, on principle, bound to select as its constructive-trust *cestui que trust* the very man the creator of the oral trust made the *cestui que trust* of the unenforceable express trust.

Before taking up the authorities a word should be said about the kind of promise that will serve to make retention by the legatee or devisee in breach of promise fraudulent. It need not be a promise expressly to hold in trust; it may be a promise to pay to the intended beneficiary money derived out of the property[52] or to convey land to him[53] or to devise to him.[54] It must, however, be a promise which was meant to be binding and not merely preca-

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where a devisee under a will prevented a revocation of a will by promising to hold in trust for certain named *cestuis que trust:* "It would be a fraud upon the testator and upon *cestuis que trust* to permit the defendant to repudiate the trust on the faith of which the estate was devised to him." It is in the legacy, devise, and intestacy cases that the courts see clearly the fraud on the *cestuis que trust* and act accordingly.

[51] That the enrichment is at the expense of the intended *cestui* is seen most clearly in those cases where the promisor partly performs to the *cestui que trust* but his administrator repudiates all liability (see Williams *v.* Fitch, 18 N. Y. 546 (1859)), or where the promisor himself repudiates after partly performing. See Harris *v.* Howell,, Gibb Eq. 11 (1798).

[52] Williams *v.* Vreeland, 29 N. J. Eq. 417 (1878), 32 N. J. Eq. 135 (1880), 32 N. J. Eq. 734 (1880).

[53] Benbrook *v.* Yancy, 96 Miss. 536, 51 So. 461 (1910); Dowd *v.* Tucker, 41 Conn. 197 (1874).

[54] Gilpatrick *v.* Glidden, 81 Me. 137, 16 Atl. 464 (1888); Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656 (1904); Chapman's Ex'r *v.* Chapman, 152 Ky. 344, 153 S. W. 434 (1913).

tory.[55] Whenever the performance is not illegal and the promisor, who is to his knowledge regarded by the promisee as obligated to perform, fails to notify the promisee before taking title that he will not perform, he cannot keep the property and repudiate his express or implied in fact promise without being made a constructive trustee.

[To be continued]

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[55] McCormick *v.* Grogan, *supra; In re* Pitt Rivers, [1902] 1 Ch. 403; Sullivan *v.* Sullivan, [1903] 1 Ir. R. 193; Allmon *v.* Pigg, 82 Ill. 149 (1876); Orth *v.* Orth, 145 Ind. 184, 42 N. E. 277 (1896). *Cf.* Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240 (1901).

In McCormick *v.* Grogan, *supra*, p. 99, Lord Westbury, in passing on the question whether a devisee and legatee was to be deemed a trustee because of a conversation between himself and the testator about a letter which was later found with the will and which named gifts which the testator would like made, refused to imply a trust because it was impossible to say that what the legatee and devisee said to the testator amounted "to a distinct promise, the breach of which would constitute a fraud; for you cannot constitute a fraud in this matter unless you find that there is a distinct and positive promise, the non-fulfillment of which brands the party with disgrace as having personally imposed on the testator . . . and there is nothing, therefore, to justify the appellant in coming here to fasten that personal imputation upon the respondent and then to derive from that a conclusion of trust in favor of himself."